(4)

Supreme Court, U.S.
FILED
JAN 10 2001
OFFICE OF THE CLERK

No. 00-825

In the
Supreme Court of the United States

OCTOBER TERM 2000

MINDGAMES, INC.

Petitioner,

v.

WESTERN PUBLISHING COMPANY, INC.

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

E. CAMPION KERSTEN
Attorney for Petitioner

Of Counsel:
KERSTEN & MCKINNON, S.C.
231 West Wisconsin Avenue
Milwaukee, Wisconsin 53203
Telephone: (414) 271-0054

14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. *Overview* 1

II. *Western's "Alternative" Arguments Were Only Aspects of Its "New Business" Rule Argument* 2

III. *No "Non-New Business" Rule Summary Judgment Issues Were Litigated in the District Court* 5

IV. *Western's Responses to the Constitutional Arguments in the Petition Fail Because They Falsely Assume that MindGames Was Given Fair Notice of the Need and Opportunity to Present Evidence of Lost Sales and Royalties in the District Court* 6

V. *Western's Misconstrues the Seventh Circuit's "Reasonable Certainty" Analysis* 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

American Fidelity Fire Ins. Co. v. Kennedy Bros. Constr., 670 S.W.2d 798 (Ark. 1984) 9

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 5, 6, 8

Finley v. North River Records, Inc., 148 F.3d 913 (8th Cir. 1998) 3

Hillside Enterprises v. Carlisle Corp., 69 F.3d 1410 (8th Cir. 1995) 4

Jim Halsey Co. v. Bonar, 683 S.W.2d 898 (Ark. 1985) 3, 9

Union National Bank of Little Rock v. Moshbacher, 933 F.2d 1440 (8th Cir. 1991), *cert. denied*, 502 U.S. 1031 (1992) 3, 9

Statutes and Rules

U. S. CONST. amend. V 6

U. S. CONST. amend. VII 6

Other Authorities

Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2720 at 345 (1998) 7

ARGUMENT

I. Overview

Stripped of pejoratives and rhetoric, Western's response is nothing more than a belated attempt to metamorphose arguments it made in the district court as reasons to apply the "new business" rule into an "alternative" basis for summary judgment independent of the rule. When the falsity of this attempt is exposed, Western's arguments against the petition collapse.

The majority rationalized affirming the summary judgment on the ground that MindGames failed to point out evidence from which lost royalties could be approximated in response to the argument in Western's "brief in this court" that "MindGames' claim for lost royalties was too speculative." App. 15. The extreme unfairness of this ruling is explained in Judge Fairchild's dissent (App. 17-18):

> It is true that in responding to Western's motion for partial summary judgment MindGames did not provide evidentiary material tending to show the breaches by Western nor that such breaches caused a loss of sales. This should not be deemed a waiver or forfeiture of an opportunity to do so because of *Western's complete reliance in its motion on the new business rule* and *Marvell*, which, if applied, would *prevent* proof of breach and causation of loss. Western's motion did not reach the issue of breach, and *establishing*

> *damages would require MindGames to prove that the breach occurred and caused loss of sales. . . . Western did not squarely assert, as an alternative ground, that MindGames could not prove to a reasonable certainty that any breach by Western caused loss of sales.* Rather, Western urged that the district court should strictly apply the new business rule.

(Emphasis supplied.)

Judge Fairchild put his finger on the problem this court should address: it is wrong to summarily deprive MindGames of its right to a jury trial for failing to produce evidence of lost sales and royalties in response to an argument first made by Western in the court of appeals when the *only* issue raised and considered in the district court was whether, as a matter of Arkansas law, MindGames had a right to introduce such evidence - when the only issue was not the availability of damage proof but whether the "new business" rule allowed it.

II. Western's "Alternative" Arguments Were Only Aspects of Its "New Business" Rule Argument.

Western's assertion that MindGames cannot seek lost royalties because it had no past profits is merely an aspect of the "new business" rule and was never presented as an "alternative" to the rule as a basis for summary judgment. The rationale for the "new business" rule is that the lack of a track record of past profits precludes a claim for future profits. Any distinction Western might try to imply is fruitless since under Arkansas law, which controls, the

absence of past profits does not prevent recovery of lost future profits.[1]

What Western actually argued below was that, "even if the Court were to reject a strict application of the New Business Rule, this [district] Court should still grant Western's motion for partial summary judgment because MindGames has no history of past profits" (App. 64), citing non-Arkansas cases that, in close analogy to the "new business" rule, preclude recovery of anticipated profits *as a matter of law* in the absence of past profits. Western did *not* argue that MindGames would be unable to demonstrate higher game sales absent breach.

Western's "uncertainty of the entertainment industry" argument was also part of its "new business" rule argument. It cannot justifiably tell this court the argument was in the alternative to its "new business" rule argument when it told the district court (App. 57):

> Even if the Court were to question whether the Arkansas Supreme Court would retreat from its across the board application of the New

---

[1] *Union National Bank of Little Rock v. Moshbacher*, 933 F.2d 1440 (8th Cir. 1991), *cert denied*, 502 U.S. 1031 (1992) (under Arkansas law established business can recover lost future profits despite recent loss history); *Jim Halsey Co. v. Bonar*, 683 S.W.2d 898 (Ark. 1985) (concert promoter can claim lost profits on future concerts despite absence of evidence of successful earlier promotions); *Finley v. North River Records, Inc.*, 148 F.3d 913 (8th Cir. 1998) (under Arkansas law a fledgling music concert promoter can recover lost future profits despite absence of any prior success).

> Business Rule, there can be no doubt that such a retreat would not be warranted here. It is particularly appropriate to apply this rule in the entertainment/consumer product industry where the chances of success are next to impossible to predict . . . .

The majority opinion itself recognized Western's argument as "just a variant of the discredited 'new business' rule." App. 13.

The requirement of proving damages to a reasonable certainty is not an "alternative" to Western's "new business" rule argument. This third and last supposed "alternative" is based upon Western's discussion of *Hillside Enterprises v. Carlisle Corp.*, 69 F.3d 1410 (8th Cir. 1995). Far from citing *Hillside Enterprises* as the basis for an alternative ground for summary judgment, Western told the district court (App. 61): "The Eight[h] Circuit Court's opinion in *Hillside Enterprises* illustrates the rationale and application of the New Business Rule in the entertainment/consumer product industry."

Western's representation that it argued the reasonable certainty rule as an alternative basis for summary judgment is simply untrue. Western raised no argument or challenge that called upon MindGames to present proof of lost future sales of *Clever Endeavor* and attendant lost royalties in the district court.

Western could have positioned itself to make the alternative argument it now pretends to have made in the district court simply by propounding interrogatories seeking MindGames' evidence on lost sales and royalties, thus testing

the availability of required evidence as the defendant did in *Celotex Corp. v. Catrett*, 477 U.S. 317, 320 (1986). Western did nothing like that. Discovery on lost royalty damages was not reached, nor did Western support its motion with any evidence or record calling upon MindGames to develop and present evidence of lost sales and royalties. Accordingly, "speculative damages" as a separate ground for summary judgment was simply not raised below and cannot properly serve as a basis for affirmance.

III. No "Non-New Business" Rule Summary Judgment Issues Were Litigated in the District Court.

Without explanation Western asserts MindGames had to know it was being called upon to demonstrate lost sales and royalties because of Western's "non-new business rule argument" (Response at 12) that entertainment products are too speculative to be the subject of recoverable damages. As shown above, Western raised that issue only as part of its "new business" rule argument.

Western's characterization of the Blackwell summary judgment affidavits is misleading. The record shows Mr. Blackwell merely listed his damage theories, without attempting to provide an evidentiary basis for estimating lost sales. App. 93-96. Again, such evidence was not called for by Western's motion, predicated as it was on the sole ground that any such evidence should be precluded.

IV. Western's Responses to the Constitutional Arguments in the Petition Fail Because They Falsely Assume that MindGames Was Given Fair Notice of the Need and Opportunity to Present Evidence of Lost Sales and Royalties in the District Court.

The petition explains (at 12-20) how the court of appeals majority departed from the proper course of judicial proceedings and violated the Fifth and Seventh Amendments in granting a summary judgment *sua sponte* without MindGames having had fair notice and an opportunity to present evidence in the district court that *Clever Endeavor* sales and royalties were lost due to Western's multiple breaches of the License Agreement. Western does not deny these errors, if they occurred, would justify granting the petition. It argues only that it made the district court record required to support affirmance.

As shown above, Western put all its chips on the "new business" rule in the district court and did not make an alternative argument requiring MindGames to present evidence of lost sales and royalties.

Because the court of appeals affirmed even though Western failed both to make a proper record and to give proper notice, *Celotex* was violated. Western's argument (Response at 16) that a summary judgment can be granted, *sua sponte* or otherwise, without the nonmovant receiving fair notice of the evidentiary record it is required to make, is a perversion of *Celotex*, 477 U.S. at 317, too obvious to require response.

Western cites Wright & Miller, FEDERAL PRACTICE & PROCEDURE, § 2720 at 345 (1998) to the effect that the summary judgment movant need not produce evidence "but simply can argue that there is an absence of evidence by which the nonmovant can prove his case." Amen! Western has not pointed, and cannot point, to any record that it argued to the district court, "new business" rule or no, there is an absence of evidence by which MindGames can prove its case on lost game sales and royalties.

The ground relied on by the Seventh Circuit majority here is not "encompassed" in the arguments Western made in the district court. The gravamen of Western's summary judgment motion and of the district court's ruling was that MindGames had no right to offer proof of lost profits because the Arkansas "new business" rule precludes such proof as a matter of law. That is the polar opposite of arguing, "MindGames, you have the right to offer proof of lost royalties, if you have any. Show us your evidence." The former argument obviously does not encompass the latter.

The only "notice" mentioned by the majority here appears in the last paragraph of the opinion (App. 15):

> . . . Western in its brief *in this court* . . . did argue that in any event MindGames' claim for lost royalties was too speculative to ground an award of damages for that loss. The argument was brief but not so brief as to fail to put MindGames on notice of a possible alternative ground for upholding the district court's judgment; . . . .

(Emphasis supplied).

Western denies this is a reference to an argument presented only to the court of appeals – not to the district court. This court can easily judge that for itself.

Western goes so far as to argue that neither it nor the district court had any duty to notify MindGames of the need to present evidence on lost sales and royalties. Response at 22. If the majority ruling stands, Western would be right. But of course Western and the majority are wrong because *Celotex* places that very burden on a summary judgment movant and, in *sua sponte* summary judgments, on the district court. 477 U.S. at 323, 326. Western had the duty to show initially the absence of a genuine fact issue concerning MindGames' claim that game sales and royalties were lost or, at least, to challenge MindGames to demonstrate the presence of the issue. *Id.* It did not attempt to do so, filing no interrogatory answers or admissions and no deposition testimony going to the issue. It failed even to point out to the district court an absence of evidence to support MindGames' lost royalties claim. *See id.* at 325. MindGames' duty to present such evidence in the district court was thus never triggered. The Seventh Circuit cannot stay within constitutional bounds by affirming in the face of this record.

V. Western's Misconstrues the Seventh Circuit's "Reasonable Certainty" Analysis.

Western ends its brief with another attempted metamorphosis. After rehashing earlier arguments about lack of pre-breach profits and the vagaries of the entertainment industry, Western attempts to convert the majority ruling here

into a holding that MindGames could never pass the "reasonable certainty" test in any event. Response at 28-29.

Western elides over Arkansas's liberal rule that the requirement of "reasonable certainty" relates to establishing the *fact* of damages, not the *amount*.[2] *See* Judge Fairchild's dissent at App. 17.

More importantly, the Seventh Circuit did not abrogate the "new business" rule simply to resurrect it under the "reasonable certainty" rubric. It expressly disavowed any suggestion that "entertainment damages" are not recoverable. App. 13. Western ignores the "important qualification" that MindGames' damages remain speculative "given the evidence presented in the summary judgment proceedings." App. 14. The majority affirmed *not* because damages could not be proven but because "no evidence [was] presented from which a rational trier of fact could conclude *on this record* that some specific quantity, or for that matter some broad but bounded range of alternative estimates, of copies of 'Clever Endeavor' would have been sold had Western honored the contract." App. 14 (emphasis by the court).

We explained above why the record lacks such evidence and why it is manifestly unfair to affirm on that basis.

---

[2] *Union National Bank of Little Rock*, 933 F.2d at 1444 (Arkansas law); *Jim Halsey*, 683 S.W.2d at 903; *American Fidelity Fire Ins. Co. v. Kennedy Bros. Constr.*, 670 S.W.2d 798, 799 (Ark. 1984).

CONCLUSION

If the court of appeals can create grounds to affirm summary judgments outside of the district court record, summary judgment procedure becomes little more than a high stakes game of "gotcha." The rights and procedural issues at stake here are too important for this court to pass by. The petition should be granted.

Respectfully submitted,

E. Campion Kersten
Attorney for the Plaintiffs-
Appellants-Petitioners

KERSTEN & McKINNON, S.C.
231 West Wisconsin Avenue, Suite 1200
Milwaukee, Wisconsin 53203
Telephone: 414/271-0054
Telecopier: 414/271-7131